

Andrew Wauchope of Niddry, Esq; Appellant.

Sir Archibald Hope, Bart. and Captain John } Respondents.
Macdowal, }

C A S E of the Respondents.

THE Lands of *Woolmet*, in the County of *Edinburgh*, formerly belonged to a Family of the Name of *Biggar*, from whom they came, by Progress, into the Person of the late Colonel *Charteris*.

Mr. *John Biggar*, the Heir of the old Family, having betaken himself to the carrying on of Coal-works, (in the Conduct of which he displayed great Ability, Spirit, and Activity) obtained, in 1723, a Lease for three 19 Years of the Coal in these Lands of *Woolmet*.

After working this Coal for many Years, Mr. *Biggar* found his Works suffer so much, from the overflowing of Water, that it became necessary for him to devise some Expedient for carrying it off; and as the Expence of a Fire-engine would have been considerable, Mr. *Biggar*, who was a Man of a most enterprising Genius, formed a Plan for making a *Drain* or *Level* through all the inferior Grounds to the Sea; which might not only be useful to himself, but also of great Advantage to the Proprietors of those other Estates, and of Utility to the Public.

The Lands of *Woolmet* lie about the Distance of four Miles from *Edinburgh*; and there is a gentle Fall the whole Way from these Lands to the Sea. In that Space, four different Properties intervene:—FIRST, A small Angle of Mr. *Wauchope* of *Edmonstone*'s Estate, which intersects between *Woolmet* and the Appellant's Lands.—SECONDLY, The Appellant's whole Estate of *Niddry*.—THIRDLY, A Part of the Estate of *Brunstane*.—AND, FOURTHLY, The Earl of *Abercorn*'s Estate of *Duddingstone*, which runs to the Sea-shore. The *Woolmet* Veins or Seams of Coal are continued and run through all these other Lands to the Sea:—They form altogether a very extensive and valuable Field of Coal, which from its Vicinity to *Edinburgh*, and to a populous Country, could, if cleared of Water, be wrought so as to serve the Neighbourhood much cheaper than from any other Quarter.

In Prosecution of his Plan, Mr. *Biggar* entered into a Lease with the Earl of *Abercorn*, for his Colliery of *Duddingstone*, with a Liberty of carrying up a Level through that Estate, and communicating the same to the superior Coal-works. He, in the next Place, purchased the same Liberty of continuing the Level through that Part of the Estate of *Brunstane*, which lies intersected between *Duddingstone* and the Appellant's Lands of *Niddry*.

And, in 1748, Mr. *Biggar* entered into a Lease of nineteen Years with the Appellant for his Colliery, containing a Covenant for communicating the Level to that Colliery, and continuing it through the Appellant's Estate to the *Woolmet* Colliery.—The Clause respecting the Level is thus expressed: "And whereas, by Tack entered into betwixt the said *John Biggar* and the Earl of *Abercorn*, of Date the 23d of April and 9th May, 1746 Years, it is, amongst other Things, declared, That it shall be in the Power of one or either Party, to communicate the Level of the said Earl's Coal at *Duddingstone* to any neighbouring Coal-works, and to submit to Arbiters to determine what Consideration either of the said Parties is to pay the other for the Liberty of such Communication; it is therefore hereby agreed, that the said *John Biggar* shall procure the said Earl's Consent to communicate the said Level to the foresaid Coal of *Niddry*; and that the said *Andrew Wauchope* shall reimburse the said *John Biggar* of the one Half of the Consideration, to be paid by him to the said Earl, for the Benefit of communicating his Level to the said Coal of *Niddry*; provided the said Half does not exceed the Sum of 1000 Merks Scots: And further, it is hereby declared, That in case it shall be found afterwards necessary and beneficial to communicate the said Level of the said Coal of *Niddry* to any neighbouring Heretor's Coal, the same shall only be done with the Advice and Consent of both Parties, and no otherwise; and the Consideration to be received for such communicating of the Level, shall pertain and be equally divided betwixt them: And further, the said *John Biggar* binds and obliges himself and his Forefairs, to leave a sufficient Chimney Wall betwixt the *Niddry* Coal and those of the Neighbourhood, except in that Seam of Coal whereby the Level is to be communicated to any neighbouring Heretor, in the Terms before-mentioned; in the which Seam he shall have Liberty to work through the said Chimney Wall into the neighbouring Heretor's Grounds: And that whenever the said Level is brought up and communicated into the Coal in the Lands of *Woolmet*, the said *John Biggar* obliges him and his Forefairs, not to communicate the Benefit thereof to any neighbouring Heretor's Grounds, without the Advice and Consent of the said *Andrew Wauchope* first had and obtained thereto."

The Appellant's Estate being strictly entailed, without Power to the Heir in Possession of granting Leases for any Term beyond his own Life, the following Provision for Mr. *Biggar*'s Indemnification, in case he should happen to be cut short by the Appellant's Death before the Expiration of the nineteen Years, was made: "Provided and declared, That in case of the Decease of the said *Andrew Wauchope*, before the Expiration of the first five Years of this present Tack, and that thereby the said *John Biggar* and his Forefairs be turned out of the Possession, then, and in that Case, the said *Andrew Wauchope* binds and obliges him, his Heirs, Executors, and Successors, to pay to the said *John Biggar*, and his Forefairs, the Sum of 500 l. Sterling, on Account of the Damage he may have sustained by the Expences laid out by him and his Forefairs, in putting the said Coal-works in Order; and if the said *Andrew Wauchope* survive the first five Years, and decease before the Expiration of the first ten Years of the said Tack, and that thereby the said *John Biggar* and his Forefairs be turned out of the Possession, then, and in that Case, the said *Andrew Wauchope* obliges him and his Forefairs to pay to the said *John Biggar*, or his Forefairs, the Sum of 250 l. Sterling, on Account foresaid; and if he survive the first ten Years, and die before the Expiration of the first fifteen Years thereof, and that thereby the said *John Biggar* and his Forefairs be turned out of the Possession, then, and in that Case, the said *Andrew Wauchope* binds and obliges himself and his Forefairs, to make Payment to the said *John Biggar*, and his Forefairs, of the Sum of 125 l. Sterling, upon Account of his Damages as aforesaid, and that the first Term of *Martmas* or *Whitsunday* after the said *John Biggar*, or his Forefairs, their Removal, with a fifth Part of the said several Sums in the Events foresaid, of Penalty, in case of Faillie, and the Annualrent after the Term of Payment above-mentioned, during the not Payment." And the Rent reserved to the Appellant is 1000 Merks (55 l. 11 s. 2 d. Sterling) a Year, or a tenth Part of the gross Produce, in his Option.

From the whole Tenor of this Lease (though shortly expressed) two Things clearly appear: First, That the continuation of the Level was one of the chief Objects of both Parties. And, 2dly, That they both understood the Communication thereof, through the *Niddry* to the *Woolmet* Colliery, to be specially agreed upon between them, as well as contracted for in the Lease.

Mr. *Biggar*, after having obtained this Lease, began the expensive Operation of running a Level from the Sea, through all these different Estates; but having died before the Work was completed, it was carried on by his Brother and Successor: And

he having also died after having brought the Level almost up to the *Woolmet* Coal, but before it was actually communicated thereto, the Respondent, Sir *Archibald Hope*, in Right of Captain *M^cDowall*, Nephew and Heir of the two Brothers, proceeded to complete the same, but was stoppt by a Sift (in the Nature of an Injunction) upon a Bill of *Suspension* for the Appellant, at a Time, when the Level had been carried within forty Fathoms, or thereabouts, of the March or Extremity of the Lands of *Niddry*, next adjoining to *Woolmet*.—This Measure was the more unexpected, as the Appellant, though constantly residing on the Spot, and having daily Opportunities of seeing the Work advance, had, till then, allowed it to go on without Challenge or Interruption.—He well knew the avowed Purpose of carrying on the Level to *Woolmet*.—That Purpose was not only evident from the Mode of working the Level, but was also fully understood between the Parties, and by every Man employed in the Work.

The Matter in Dispute was afterwards referred, by the Parties, to Arbitration; the Lord President of the Court of Session being mutually chosen sole Arbitrator between them: And his Lordship, in August 1765, on advising a Memorial for the Appellant, and Answers for the Respondents, appointed *John Coventry*, Overseer of the *Allea* Coal, to visit the Level in Dispute, and report his Opinion upon sundry Facts, and particularly upon the two following: 1^{mo}, Whether or not Lord *Abercorn*, if he so inclined, could effectually stop the Level in his Grounds, so as to make the Water regorge upon *Niddry*? And, 2^{do}, Whether *Niddry* could stop his Level, so as to make the Water regorge upon *Edmonstone*?—And Mr. *Coventry* answered to both these Questions, That it was impossible to stop the Water effectually. The Arbitrator, upon the 9th of September 1765, pronounced an *Interim Decree*, giving Liberty to the Respondent “forthwith to proceed in working up the Level in question “to the Boundary of the Coal of *Niddry* with that of *Edmonstone*, and there opening the said Level unto the Coal of *Edmonstone*, in order to carrying the same forward to the Level within the Lands of *Woolmet*; reserving to himself afterwards to “determine the other Points submitted to him.”

The Level was accordingly carried on from the Appellant's Estate, through the small Angle of *Edmonstone*, lying interjected betwixt *Niddry* and *Woolmet*, into the *Woolmet* Colliery; and soon thereafter, at the Desire of the Appellant, and with the Consent of the Respondent, the Arbitrator allowed the Submission to expire.

Appellant's
Action.

The Appellant, however, thought proper afterwards to bring an Action in the Court of Session against the Respondents; concluding, That they “ought and should be decerned and ordained, conjunctly and severally, to make Payment to him of “the Sum of 300*l*. Sterling Money yearly, from the Day of “that the foresaid Level of the Coal of *Niddry* “was opened and communicated by them to the foresaid Coals of *Edmonstone* and *Woolmet*, being the Value of the 20th Part “of the said Coals, in Time coming, ay and until they shall cause to be delivered to the said Pursuer the 20th Part of the said “Coal, as the same is raised and wrought, according as the Value of the Coal wrought, or hereafter to be wrought, shall be “proven by the Books kept of the said Coal, or otherwise *pro ut de jure*, in the Course of the Process to follow hereon; at “least if it should be found, that the said Defendants are not liable in Payment to the Pursuer of the foresaid 20th Part of the “Coals raised, and to be raised by them in Manner foresaid; then and in that Case it ought and should be found and declared “by Decreet foresaid, that the Pursuer may stop and shut up the foresaid Level of Communication, between the Level of “*Niddry* Coal and the Coals of *Edmonstone* and *Woolmet*; and keep the same stopped and shut up in all Times coming: And “further, it ought and should be found and declared, that the said *John M^cDowall* and Sir *Archibald Hope* are bound by the “foresaid Tack, set by the Pursuer to *John Biggar*, to obtain and procure, from the Earl of *Abercorn*, the perpetual Use and “Servitude of his Level through the Lands of *Duddingstone* to the Sea, for carrying off the Water from *Niddry* Coal; and “they ought and should be decerned, and ordained to procure and deliver to the Pursuer a Writing from the Earl of *Abercorn* “in his Favours, giving the perpetual Use and Servitude of his Level accordingly; and in case it shall be found, that the “Earl of *Abercorn* is not bound in Law to give the Use of his Level to the Pursuer; but that he may shut up the same, “whereby the Pursuer's Coal will be drowned; then the said *John M^cDowall* and *Archibald Hope* ought and should be de- “cerned, conjunctly and severally, to make Payment to the Pursuer of the Sum of 20,000*l*. Sterling Money, as the Amount “of the Damage he will thereby sustain: And farther, the said *John M^cDowall* and Sir *Archibald Hope* ought and should be “prohibited and discharged by Decreet foresaid, from communicating the said Level of *Niddry* Coal, to the Coal of any other “neighbouring Heretor, without the special Advice and Consent of the said Pursuer: And, lastly, the said *John M^cDowall* “and Sir *Archibald Hope* ought and should be decerned and ordained, by Decreet foresaid, to make Payment to the Pursuer, of “the Sum of 1000*l*. Sterling, in Name of Damages, and as the Expence the Pursuer has already sustained by the foresaid “Level's being communicated in the Manner foresaid, and the Expences of the Process to follow hereupon.”

1770, Feb. 24.
Interlocutor of
Lord Kennet,
Ordinary.

This Action came in Course to be heard before the Lord Kennet, Ordinary, who, after hearing Parties fully upon the Appellant's different Conclusions, pronounced the following interlocutor: “Having heard Parties Procurators of Consent, finds, “that under the Lease libelled on, the Defender (Mr. *Hope*) cannot communicate the Level in the Estate of *Woolmet* to any “Heretors Coal above the Estate, without the Consent of the Pursuer (Mr. *Wauchope* of *Niddry*) and appoints both Parties “to give in Memorials upon the other Points in the Cause.”

The Matter in Dispute between the Parties was, by this interlocutory Order, made of Consent, narrowed to the two following Questions: First, *Whether the Appellant, under the Words and Intendment of the Lease, was intitled to any, and what, Compensation, for permitting the Level to be carried from his Lands of Niddry, through the small Angle of Edmonstone, to the Woolmet Colliery.* And, 2^{dly}, *Whether it was incumbent upon the Respondents to procure the Earl of Abercorn's Consent to a perpetual Communication of the Level through his Estate of Duddingstone, before the Appellant became by the Lease bound to permit that Level to be carried farther on from his Lands of Niddry to the Woolmet Colliery; and till such Consent shall be obtained, if the Appellant is not intitled to shut up the Level from Niddry to Woolmet.*

As a Preliminary to the Argument upon these two Questions, the Respondents stated the different Situation of the Parties, and of their several apparent Interests in the Collieries through which the Level was to be carried, in 1748, at the Time of making the Lease, and now in the Pendency of the present Action.

In 1748, the Appellant's Coal was of so little Value, that he only estimated the Alternative of a Money Rent, stipulated by the Lease, as payable to him, at 1000 Merks, or 55*l*. 11*s*. 2*d*. Sterling, a Year. The extensive Level which has since been executed, he considered as either so uncertain or impracticable, that he bound Mr. *Biggar* by special Covenant to erect an Engine for the *Niddry* Coal, which the Making (as now seems to be agreed upon at all Hands) of the Level has rendered quite unnecessary: He farther secured the perpetual Communication of the Level (when made) to his own Coal, at an Expence not to exceed, in any Event, 55*l*. 11*s*. 2*d*.—By doing so, he then either considered it to be of small Import or Value, or he estimated the Permission of continuing the Level through his own Lands, to Mr. *Biggar*'s *Woolmet* Colliery, as the farther Compensation by him given for the making of the Level, and communicating it to his own Colliery of *Niddry*.—The possible Advantages which might be got from farther or other Communications of the Level, or from third Parties benefiting thereby, were at this Period so improbable or distant, as, from all Appearances, to have entered very little into the Consideration of Parties; and the Circumstances of the Appellant's letting his Coal for 55*l*. 11*s*. 2*d*. and only valuing the Half of the Communication of the Level to his own Colliery at the same Sum (with the Term of 32 Years, then to run, of Mr. *Biggar*'s Lease of the *Woolmet* Colliery) account for that Inattention.—So far as related to their own Collieries of *Niddry* and *Woolmet*, the Communication was to be mutual, and without other Expence to either Party, than what had been expressly stipulated for in the Lease; plainly indicating their understanding of the Matter to be, that the Level was a common Property between them; free to their own Collieries of *Niddry* and *Woolmet*; and if any farther Communications should be made to other Collieries, in consequence of the Transactions betwixt them, the Profits should be equally shared.

Under these Circumstances and Impressions stood the Parties in 1748, at the Time of making the Lease in Question.—Whereas now the Appellant's Colliery of *Niddry* (which, in 1748, was only considered to be worth a Rent of 55*l*. 11*s*. 2*d*. a Year; and could not be wrought without an Engine) has by the Skill and Industry of Mr. *Biggar*, his Brother, and of the Respondent Sir *Archibald Hope*, and at an immense Expence to them, been brought to the highest State of Improvement; and a Field of Coal cleared and made accessible, which, at the common Price of the Country, will yield a gross Produce of upwards of 70,000*l*. Sterling.



Sterling.—On the other Hand, the Respondents Lease of the *Woolmet's* Colliery has but a few Years to run; and if the Appellant can be so successful as to exclude the Respondents Collieries from the Benefit of the *Level*, and at the same Time to retain it to himself, he clearly withholds from him the only substantial Benefit Mr. *Biggar* could ever propose to himself by the Transaction.

On this Part of the Case the Respondents concluded therefore with praying, That the Court, in determining the Import and Meaning of the Lease, would take along with them, and have always under their Eye, the Situation of the Parties, and State of the different Collieries, at the Time of making that Lease, as Circumstances which might throw great Lights on the Matter, and lead to the Intention and Understanding of Parties at the Time.

Having premised so much, the Respondents next proceeded to the first Question on the Merits, *Whether the Appellant was intitled to any, and what, Compensation for permitting the Level to be communicated through the small Angle of the Edmonstone Lands to the Woolmet Colliery?* And which naturally divided itself into two other Questions, requiring separate Considerations, viz. First, *In so far as it extended to a Communication of the Level to the Woolmet Colliery solely and exclusively:* And, secondly, *In so far as the interjected Edmonstone Colliery takes the Benefit and Use of this Level.*

And on the First, the Respondents pleaded, that the Intention of Parties was clear and beyond a Doubt. The different Clauses of the Lease, however briefly expressed, and the Circumstances of the Case, speak their Sense of the Matter to be, that the Level, on Payment of 55*l.* 11*s.* 2*d.* by the Appellant, was to be a joint Property between him and Mr. *Biggar*, communicable, without other or farther Consideration, to their different Collieries of *Niddry* and *Woolmet*, and to continue and be of equal Duration with their respective Interests in these Collieries. That this was the great Line and Basis of the Agreement between the Parties, so far as related to the Level; and it was a Bargain very beneficial to the Appellant, who thereby secured to his Colliery (which has since turned out so extensive and valuable) the free Use of a Level that will keep it for ever clear of Water, and which cost Mr. *Biggar*, in purchasing the Permission, and in the Work, a very large Sum of Money. And the only Consideration given (except the contingent trifling Sum of 55*l.* 11*s.* 2*d.*) by the Appellant, for these valuable and lasting Advantages, is, the Permission to Mr. *Biggar*, and to the Respondents in his Right, to continue this Level to the *Woolmet* Colliery, the great and primary Object of Mr. *Biggar*, in planning, undertaking, and executing this great Work: That any possible Benefit which could arise from the Appellant's Lease to Mr. *Biggar*, was totally inadequate to the Expence of such a Work as the Level in Question, and to the Length of Time it must have necessarily, and has actually, taken to execute.—The Lease was only for 19 Years; it might have determined earlier by the Death of the Appellant.—The *Niddry* Colliery had before that Period been much neglected; it was a Work of Time to put it in Order, and the Result has shewn, that almost the full Term in the Lease had expired before the Level was completed.—In Fact, only so much of the *Niddry* Coal had been wrought during the Term of this Lease, as was necessary for carrying on the Level: Three Seams, out of about thirty, were only touched by the Lessee; and even in these three Seams, a great deal of prepared Work was left behind, by which the Appellant has since reaped very great Benefit.—Under all these Circumstances, it is therefore impossible to conceive, that Mr. *Biggar's* Intention in this expensive Work went no farther than to a Communication with the *Niddry* Colliery, when his Interest in that Colliery might have expired before, and actually expired soon after that Communication was effectuated. The Sense and Reason of the Thing speak strongly the contrary; and that Mr. *Biggar's* great and chief Purpose was to get the Level brought to the *Woolmet* Colliery, then completely appointed in all other Respects, and in which he had 32 Years to run.—Had it been understood between the Parties, that the farther Communication of the Level beyond the *Niddry* Estate was to be altogether arbitrary on the Part of the Appellant, the Clause would have run in the common Style, stipulating that Mr. *Biggar* should be bound to leave a sufficient Chinny Wall: But the Clause, as it now stands, on the contrary, talks of the Communication of the Level with the Consent of both Parties, which is supposing the Level to be a common Property; and that, by extending it beyond the Appellant's Property, into the *Woolmet* Colliery, it might become subject to the Power of Mr. *Biggar*; and therefore this Clause became necessary, prohibiting the Communication of it to superior Collieries, without the Consent of both Parties. There was clearly no Occasion for making any Provisions restraining the free Use of the Level, upon its being carried into the Lands of *Woolmet*, if it had been in the Appellant's Power, by withholding his Consent, to prevent the Level from going beyond the March of *Niddry*; and if a Consent, to be afterwards obtained from him, was necessary for carrying it farther, it would have been full Time, when he gave that Consent, to have clogged it with such Conditions as he thought proper. But as it was understood by the contracting Parties, that in all Events, and in Conformity to the great Object of Mr. *Biggar*, the Level was to be carried into the Estate of *Woolmet*; therefore the Appellant very properly provides against all farther Communication thereof without his own Consent.

The Respondents farther contended, That it was the clear Understanding of the Parties, as to the Communication of the Level to *Woolmet*, at the Time of executing the *Niddry* Lease, that gives Rise to any Doubt or Ambiguity now. When Parties differ in the Adjustment of any Point, or when Terms are not perfectly understood between them, they are then at Pains to express their Meaning by Clauses that are clear and explicit, but when there is no Ambiguity or Doubt betwixt them, they are the less apt to advert to Difficulties which may afterwards arise; and therefore, in Place of accurately pointing out their Meaning by Clauses properly conceived for that Purpose, Clauses are worded shortly, because it did not occur to them that any Difference could arise respecting a Matter upon which they were so much agreed, and which was so clearly and thoroughly understood betwixt them. This is precisely the present Case. The Communication of the Level to *Woolmet* was the great Object of the Contract upon the Part of Mr. *Biggar*, and it was clearly understood to be so by both contracting Parties, and therefore it did not occur to be necessary to be very minute or pointed in stipulating, that it should be in Mr. *Biggar's* Power to carry on the Level to *Woolmet*; but that Power is taken for granted. The whole Clause respecting the Level goes upon that Supposition, and the Situation of Parties places it beyond the Possibility of a Doubt. That were it necessary, there are Persons still living who were Witnesses to the Communings which passed between the Appellant and Mr. *Biggar* at the Execution of the Lease, and by their Testimony it can be proved, that from these Communings it was clearly the Understanding and Intendment of Parties, that the Level was undoubtedly to extend to the Coal of *Woolmet*.

The Respondents having thus established the clear Understanding of Parties, that the Level was to be continued by Mr. *Biggar* to the *Woolmet* Colliery, without any Power or Controul on the Part of the Appellant, next pleaded, as a necessary Consequence, that no Consideration was exigible by the Appellant for such Communication: This is clearly founded on the the Conception of the Contract itself. The whole Clause respecting a Consideration to be given or received, relates only to a Communication to be made with the mutual Consent of Parties.—Where the mutual Consent of Parties was necessary to make the Communication, either of the Parties were undoubtedly intitled to stipulate a Consideration for giving such Consent; and the Contract has provided, that what should be so received, should be equally divided betwixt them: but it would be inconsistent with Reason, and the Nature of the Thing, to suppose that a Consideration should be exigible for consenting to a Communication of the Level, when the Communication could have been made without such Consent; so that truly the Question, whether the Appellant is intitled to demand a Consideration for the Communication of the Level to *Woolmet*, must depend upon this other Question, whether, at the Time of making the Communication, it could not be done without his Consent? 2dly, That such was the Understanding of Parties, is perfectly clear from this other Consideration, that there is not a Word in the Lease which talks, or so much as supposes, that a Consideration was to be given by the one contracting Party to the other, and yet the whole of the Appellant's present Claim goes upon that Foundation. The Reverse was the Understanding of the Parties, and indeed is implied in the Words of the Lease.—The Consideration to be received is to pertain to, and be equally divided between the Parties, which clearly supposes that these Parties were to reap an equal Benefit by the Consideration to be received, which could not be the Case if the whole Consideration was to be paid by one of the Parties to the other. It certainly implies that the Consideration was to be paid by a third Party, and is exclusive of the Idea of any Consideration being payable by the one Party to the other. The Level was understood as a Copartnership betwixt them, by which each of them was, in the first Place to serve his own Purpose, and then whatever more could be got from it by laying the rest of the Country under Contribution, was to be equally divided betwixt them; but according to the Appellant's Argument, Mr. *Biggar* was to be at the Expence of procuring the Consent of Lord *Abercorn* (in so far as that Expence should exceed 55*l.* 11*s.* 2*d.* Sterling)—He was to be at the Expence of procuring the Consent of the Proprietor of *Brunflane*, and at the sole Expence of carrying up the Level itself, and yet over and above all this, he was to pay a Consideration to the Appellant, his own Partner, for procuring the Benefit of the Level

Level to his own Works, though that was the only View he had for entering into the Copartnery. This is a Proposition too incredible to be seriously maintained or listened to.

That no Consideration was to be paid by Mr. Biggar, to the Appellant, appears beyond a Doubt from this other Circumstance, that no Sum whatever is named or stipulated on that Account. In so far as concerned a Consideration to be paid by a third Party, it was impossible to ascertain the Sum; because it depended upon these third Parties what they would be willing to give, and that could only be settled by an Agreement with these Parties when they came to ask the Benefit of the Level: But no such Reason did occur with respect to the Appellant and Mr. Biggar, the two Parties in the Lease, as to what should be paid by the one Party to the other in any particular Event; and it is impossible to assign a good Reason why, if a Sum was exigible by the Appellant from Mr. Biggar, for communicating the Level to the Coal of *Woolmet*, that such Sum should not have been ascertained by the Lease itself; it was of all others, the most important Article to have been settled. It has been already observed, that the Communication of the Level to *Woolmet*, was the great Object of the Undertaking upon the Part of Mr. Biggar, and therefore it is impossible to believe that that Sum would not have been ascertained, if it had been understood that the Appellant was intitled to demand any Sum from him on that Account. The Appellant, on his own Part, is so anxious and careful not to leave open any arbitrary Question, that he expressly stipulates that he is not to be liable in the Half of the Expence of procuring the Consent of Lord *Abercorn* to the Communication of the Level to *Niddry*, in so far as that Expence shall exceed 55*l.* 1*s.* 2*d.* Sterling; with equal Anxiety he ascertains the various Sums, that in different Events were to be paid in case the Lease should be cut short by his own Death during the Currency of the 19 Years, as well as the Damage which might be sustained in putting the Coal-works in Order: And when in this Manner every other Sum which in any Event fell to be paid by the one Party to the other, is fixed and ascertained, it is impossible to believe or to assign a Reason why the Sum to be paid by Mr. Biggar, to the Appellant, for communicating the Level to *Woolmet*, should not be fixed, if it had been intended that he was intitled to demand any such Sum, the more especially, that the other Sums ascertained by the Lease were in themselves capable of easy judicial Liquidation; whereas the Sum here supposed to be left open and undetermined, was in its Nature highly arbitrary, and scarce capable of Liquidation by any certain Rule.

With respect to the Benefit which the *Edmonstone* Colliery might eventually reap from carrying the Level through the small Angle of the *Edmonstone* Lands, the Respondents averred in Point of Fact, that the Part of this Colliery next adjoining to the Course of the Level, and which could be drained by that Level, was of little Value; and as the Contract between the Parties was for a Communication to the *Woolmet* Colliery, which carried the Level, however, through this inconsiderable Part of the *Edmonstone* Colliery, and no Stipulation made for exacting any Allowance from that latter Colliery for the Use of the Level, the Proprietor was intitled, without paying any Consideration, to take the Benefit of a Level carried through his own Grounds, so as he did no Injury to that Level. 2dly, That the Appellant's own Sense of the Matter appears from a Letter which he wrote the Respondent Captain *McDowall*, in the following Words: "Now, *Dear Cousin*, as I like to be explicit and above Board in all my Dealings, I shall be the same with you that I hope I have been with every one I have had to do with, and particularly with my good Friend and Relation honest *John Biggar*. So I dare say you will forgive me when I tell you, that I think it altogether inconsistent with my Interest, and I do not think it is for yours either, to allow the Level to proceed beyond the Limits of my March with *Edmonstone*, at present, nor perhaps for some considerable Time to come. As the more I consider the Tack, and the Omissions in it, I think it will be absolutely proper for us both to enter into a new Contract before that can be done: And I do not incline to execute a new Lease of any Kind, till such Time as I see what Turn this Scheme of a Bill relating to Entails of this Country shall take, which I hope shall be brought to an Issue long before the Expiration of the present Tack subsisting between you and me."

"To instance you in one Particular, where I think the present Tack is quite defective, and ought certainly to have been settled before Mr. Biggar and I signed it, but it seems it did not occur to either of us, at least it did not to me, that the Level must be communicated to *Edmonstone* before it can proceed to *Woolmet* Ground; and this I observed to Mr. Wallace several Months ago, that *Edmonstone* ought to agree to a Consideration to be given for the Benefit of it; but it would seem he never mentioned the Thing to him. But supposing the Matter adjusted with him, which I have no Doubt of being done upon reasonable Terms, here is likewise Mr. *Charteris* to be dealt with, who will have the Benefit of this Level to his Seams remaining unwrought, at the Expiration of your Lease from him."

This Letter throws much Light on the present Question in various Particulars. In the first Place, it shews that the *Edmonstone* Colliery was not considered as an Object from which any Consideration was expected by the Parties, and from the Circumstances already explained, it could not be so. 2dly, Although the nearer Approach of the Expiry of the Lease of *Woolmet* has begun to suggest the Idea of receiving a Consideration from Mr. *Charteris*, after the Expiry of the Lease, and that Circumstance made the Foundation of an Argument in this Cause, as already stated, yet it is confessed by the Appellant, that such an Idea never entered into his Mind at the Time of the Transaction with Mr. Biggar. Lastly, Throughout the whole of this Letter it is never insinuated, but, on the contrary, indirectly acknowledged, that the Level was to extend to the *Woolmet* Coal, not subject to any Controul whatever.

And the Respondents, in the last Place on this Branch of the Argument, pleaded, in Answer to what was contended on the Part of the Appellant, respecting the Irrationality of his having subjected his Estate to a perpetual *Servitude* in Favour of the Owners of the Estates of *Woolmet* and *Edmonstone*, with whom he had never entered into any Engagement for such *Servitude*, or received any Consideration therefore: That the Respondents were only here supporting the specific Performance of a Contract made by the Appellant with Mr. Biggar, in whose Right they now stand: That they had no Occasion to go farther, or to plead the Cause of other Parties.—So far as their own Interest was concerned, they were intitled from the Appellant to complete Performance of his Covenants, and more they did not ask. If other People should consequentially benefit by the Execution of the Work which they had contracted for Permission to make, that Circumstance could not disappoint them, or affect their Right.—When these Strangers, independent of, and totally unconcerned with Mr. Biggar's Representatives, came to take such Benefit, then would be the Time for the Appellant to contest with them, and not with the Respondents, how far and on what Terms they should be intitled so to do. But, 2dly, The Respondent recalled the Attention of the Court to the Situation of Parties in 1748, the Time of making the Lease in Question, when, as it is established beyond a Doubt, from the whole concurring Circumstances, the Contingency now contested appeared so trivial, insignificant, and distant, as scarcely to enter into the Consideration of Parties. They contracted for mutual free Communications of the Level to the *Niddry* and *Woolmet* Collieries, without providing for Consequences, but leaving them to be afterwards explained according to the Nature of the Contract and Circumstances of the Case. And 3dly, That this Claim of the Appellant's was premature, when the Interest of Mr. Biggar's Representatives ceased, and Strangers became intitled to the Colliery in Question, would be the Time, and not before, for the Appellant to make the Demand.

Upon the second Question.—The obtaining an Obligation from the Earl of *Abercorn*, for a perpetual Communication of the Level to the Appellant's Colliery of *Niddry*;—The Respondents first observed, in Answer to an Allegation of the Appellant's, That Mr. Wallace, Mr. Biggar's Brother and Successor, when approaching towards the March, stopp'd his Work, upon an Intimation from the Appellant, till Matters should be settled with Lord *Abercorn* for this perpetual Right: That they, the Respondents, know nothing of any such Intimation, or of Mr. Wallace's having ever stopp'd the Work for the Reason here mentioned, nor does any Evidence appear of the pretended Intimation. But in Answer to this Conclusion, they in the first Place pleaded, That even though the Earl had been disposed to shut up this Level, yet it was apprehended he could not do it effectually, for it is the Opinion of People of Skill, who have visited these Coal-works, that the Coal is of such a Nature, that the Water would find its Way in Spite of any Work that the Proprietor of the Coal of *Duddingstone* could erect. 2dly, As the Communication of the Level from *Duddingstone* to *Niddry* was lawfully made, so it is, with Submission, impossible for the Proprietor of *Duddingstone* lawfully to shut up that Communication; because it could not possibly be done without occasioning the Water to regorge upon the Property of the superior Heritor, which no inferior Heritor has a Right to do. But 3dly, That all Apprehensions upon this Head were altogether imaginary, for a Question had occurred relative to this Level, between the Earl of *Abercorn* and Mr. Wallace. It was in that Case maintained, that the Benefit of the Level, granted by the Earl, should cease with the Expiry of the Tack with which it was granted; but in this Plea the noble Lord was over-ruled, both in the Court of Session

Session and before your Lordships. The Words of the Judgement are, " find, That the Communication of the Level being granted during the Currency of the Tack, by the Lessee to a neighbouring Coal-work, is not determinable by the Terms of the Tack, but that the same may subsist for the Use of the Lessee and his Heirs, so long as they shall continue to have Right and Interest in the neighbouring Coals to which the Level shall be communicated, as the said neighbouring Coals are ascertained by the Interlocutors of the 23d December 1760, and 6th March 1761.

It having been said for the Appellant, That, in the foresaid Case it was not found that the Right of Mr. Biggar and his Heirs was perpetual, but was made to depend on the Endurance of the Interest they had in the neighbouring Coals; the Respondents answered, That the Wording of the Judgement, in that Manner, can by no Means be understood as a Limitation of the Right, but, on the contrary, as it was unnecessary to determine the Interest of third Parties, so the Terms in which it is conceived were sufficient to exhaust the Cause, as it was altogether unnecessary to carry the Judgement farther than the Extent of the Plaintiff's Interest: But it will be remembered, that the Argument in Support of Mr. Wallace's Plea, did equally apply in Support of the Rights being perpetual, and at any Rate, the Respondents have still an Interest in the neighbouring Collieries. At the same Time, the Respondents contended, that they had truly no Occasion to enter so far into the Argument, in order to point out the Security which the Appellant possesses with regard to the Level in Question; for supposing it to be otherwise, still the Conclusion of his Action against the Respondent is ill founded. Mr. Biggar, in his Contract with the Appellant, came under no Obligation to give a better Right than he had. He agreed to communicate the Right he had from Lord Abercorn.—The very Obligation he comes under, proceeds upon a Recital of the Right derived from Lord Abercorn.—The Appellant accepts of it, and does not pretend to stipulate a better Right than he knew Mr. Biggar had a Power to give; he therefore accepted of the *Duddingstone* Level under all the Powers which the Proprietor of *Duddingstone* then had, or might acquire over it. If indeed the Appellant could allege, that any Thing had been done by the Respondents in Contravention of the Lease, to injure his Right to the *Duddingstone* Level, he might then have had a something to say; but no such Thing is alleged: And in any other View his Claim against the Respondents, to render the *Duddingstone* Level more beneficial to him, or more ample and unlimited than he himself possesses it, is, with Submission, altogether groundless.

It was in the last Place stated, for the Respondents, That as they have already shown, that, according to the real Spirit and Import of the Transaction betwixt the Appellant and Mr. Biggar, the latter was intitled to have the Level communicated to the Coal of *Woolmet*, without paying any Consideration therefore, it must necessarily follow, that the Appellant has no Right to shut up that Communication. The Resolution of the second Question must depend on the first. If Mr. Biggar had a Right to communicate the Level to the Coal of *Woolmet*, of Consequence the Appellant was under an Obligation to allow that Communication to be made; and, with great Submission, it is impossible, after the Communication has been made, that the Appellant can be allowed to shut it up in Contravention of his own Obligation.

Feb. 1771.
Interlocutor
dated from.

The Court, upon the 7th February 1771, pronounced this Interlocutor: " Upon Report of the Lord Kennet, and having advised the Informations for both Parties, the Lords find, that John Biggar had a Right, by the Lease entered into betwixt him and the Pursuer, to carry his Level through the Pursuer's Lands, and to communicate the same to the Coal of *Woolmet*; and therefore find, that the Pursuer is not entitled to a Recompence from the Defenders on Account of the Communication of the said Level to the Coal of *Woolmet*, nor on Account of its being carried through a Part of *Edmonstone* Ground and Coal, which lies interjected between *Niddry* and *Woolmet*, in Respect the carrying it through *Edmonstone* Coal was essentially necessary for communicating the Level with *Woolmet*, which was one great View of the Parties at entering into the Contract: And find, that the Pursuer cannot shut up the said Level, but that the Communication thereof to *Woolmet* Coal, must subsist for the Use of the Defenders, who derive Right to *Woolmet* Coal, as Heirs or Assignees of the said deceased John Biggar, so long as they shall continue to have Right and Interest in the said Coal of *Woolmet*; and therefore allow the Defenders from these Conclusions of the Pursuers, libel and decern, and remit to the Lord Ordinary to hear Parties further on the other Points of the Cause, and to do therein as he shall find just."

The Appellant hath thought proper to appeal from this Interlocutor, but the Respondents humbly hope that the Appeal will be dismissed, (with Costs) and the Interlocutor affirmed, for the following, among other

R E A S O N S.

- I. The Words of the Lease (taking the whole Clause together) as well as the Spirit and Intendment of the Transaction 1748, and all the Circumstances of the Case, connected with the different Situations and Interests of the Parties at the Time, concur to establish that the Agreement, so far as related to the Level, was for a Partnership, or joint Property, between those Parties in that Level, to be mutually communicated, without a Demand from the one on the other (except what was expressly stipulated in the Lease) to the respective Collieries of *Niddry* and *Woolmet*. On that Footing, the Bargain was a most beneficial one to the Appellant; and on any other, it would have been most preposterous and unequal, on the Part of Mr. Biggar, who was at all the Expence, and could have no other Prospect of Gain or Advantage from the Transaction, except the Benefit which might arise to him from a free Communication of the Level to the Coal of *Woolmet*.
- II. If any Consideration had been payable for a Communication of the Level to the Coal of *Woolmet*; it would have been clearly and explicitly stipulated in the Lease. Whenever any thing is prettable by one Party to the other, the Sum is expressly covenanted. Thus, if the Lease of *Niddry* should be defeated, by the Death of the Appellant, before the full Space of 19 Years, precise Sums are stipulated in the Event of every Contingency. In like Manner, the precise Proportion of the Sum to be paid for the Communication from the Estate of *Duddingstone* to the superior Grounds is specified: And no possible Reason can be assigned, why the Sum to be paid for the Communication to the Estate of *Woolmet* should not likewise have been ascertained, excepting the true one, that nothing was understood to be payable on that Account.
- III. The Anxiety of the Appellant to guard against any Communication, by Mr. Biggar, beyond the Estate of *Woolmet*, without his Consent, affords Demonstration of his own understanding, that, in virtue of the Transaction then entered into, the Level would come under the Power of Mr. Biggar: For if it was in the Power of the Appellant to withhold his Consent to a Communication of the Level to the Estate of *Woolmet*, it was superfluous to guard against future Events, which were altogether under his own Power.
- IV. It is expressly stipulated by the Respondent, and explicitly agreed to by the Appellant, that the Profit of every after Communication, in virtue of the then Transaction, should be equally divided betwixt them; but surely such a Stipulation would have been altogether preposterous, if the whole Consideration to be paid was to come out of Mr. Biggar's own Pockets.
- V. The Appellant's own Letter, as already recited, is a clear Proof of the Understanding of the Parties, and an impartial Explanation of the Meaning of the Transaction, as importing a Certainty, that the Level was to proceed to the Estate of *Woolmet*, without any Controul on the Part of the Appellant:—His Silence during so many Years, while he saw the Level daily carrying on before his Eyes, is another Proof of that Understanding: And his Conduct in this Particular ought to bar him, *personali exceptione*, from the present Challenge, even supposing him otherwise well founded in it.

- VI. The Appellant now enjoys the Use of the Earl of *Abercorn's* Level, under a Title which the Respondent is advised cannot be defeated; but, in the present Case, it is sufficient for his Purpose to say, that the Judgement of your Lordships secures that Enjoyment to the Appellant, as long at least as the Respondent, in Right of Mr. *Biggar*, shall have an Interest in the upper Collieries: For while the Appellant has the full and free Possession of the Communication he contracted for, in lieu of the Communication he was to give, it would be the Height of Injustice in him to withhold that Communication, under Pretence of a Possibility of his own Right being challenged at some distant future Day.
- VII. Lastly, The present Claim of the Appellant is made under the most unfavourable Circumstances: Mr. *Biggar*, at a great Expence, and in a Course of Time equal to an ordinary Life, planned, purchased the Ground and Permissions, and (by himself, and those in his Right) executed this great Work;—The Appellant has benefited, more than any other Person, by these extensive Operations: *Before*, his Colliery could not be wrought without an Engine, and was of so little Value as to let on a nineteen Years Lease at the trifling alternative Money Rent of 55 *l.* 11 *s.* 2 *d.* Sterling; *now* at an Expence which can never exceed 55 *l.* 11 *s.* 2 *d.* he has got Possession of a Right to a Level (that cost many thousand Pounds to execute) which saves him the Expence of an Engine, and effectually keeps his Works clear of Water; and, by the Skill and Ability, and at the Expence of Mr. *Biggar*, he has got, besides, a clear and accessible Field of Coal to work on, which will yield of gross Produce, at a moderate Computation, 70,000 *l.*

Die Jovis 28^o Janrij 1773.

AL. WEDDERBURN.
HENRY DUNDAS.

Ordered and adjudged That the Interlog. Complaind of be Reversed: And it is Declared That Mr. Biggar had no Right by the Lease entered into between him and the Appell^t. to Communicate the Level carried through the Appell^t. Lands to Lands of Edmonstone or Woolnot without the Appell^t. Consent first had and obtained: And it is further Ordered That the Cause be remitted to the Court Session to do thereupon shall be agreeable to Law and Justice.



CASE of the Respondents.

Andrew Wauchope of Niddry, Esq. Appellant.
Sir Archibald Hope, Bart. and others, Respondents.

To be heard at the Bar of the House of Lords, on Monday
the 25th of January, 1773.